Supreme Court, U.S.
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No. 99-72

In The

Supreme Court of the United States

CHEMINOR DRUGS, LTD. and
REDDY-CHEMINOR, INC.,

Petitioners,

v.

ETHYL CORPORATION and
JOHN DOES 1 THROUGH 10,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT ETHYL CORPORATION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is the filing of a petition with a federal administrative agency entitled to *Noerr-Pennington* immunity, where probable cause existed and where the petition was not "objectively baseless," but where the petition allegedly misrepresented certain facts?

II. Is the filing of a petition with a federal administrative agency entitled to *Noerr-Pennington* immunity, where the petition allegedly misrepresented certain facts, but where those alleged misrepresentations did not infect the core of the petition or the agency's resultant actions?

III. Do the facts of this case justify application of the same First Amendment principles on which *Noerr-Pennington* immunity is based to plaintiffs/petitioners' common law tort claims of malicious prosecution, abuse of process, tortious interference and unfair competition?

RULE 29.6 STATEMENT

Respondent Ethyl Corporation has no parent company and there is no publicly held company that owns 10% or more of Ethyl's stock. As of March 1, 1994, Ethyl formed Albemarle Corporation to own and operate its specialty chemicals lines of business (including the bulk ibuprofen business that is the subject matter of the instant litigation), and distributed the stock of Albemarle Corporation to Ethyl Corporation shareholders of record. Albemarle has no parent company and there is no publicly held company that owns 10% or more of Albemarle's stock.

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STATEMENT OF THE CASE

Ibuprofen is an anti-inflammatory drug whose patent protection expired in September 1986. At the time, respondent Ethyl Corporation ("Ethyl") was the only domestic manufacturer of bulk ibuprofen. JA 1241.[1] In 1988, petitioner Cheminor Drugs, Ltd. ("Cheminor"), a company organized and based in India, was approved by the Food and Drug Administration ("FDA") to sell bulk ibuprofen to tablet manufacturers in the United States. JA 1242. U.S. imports of Cheminor's bulk ibuprofen rose from 57,000 kg. in 1988 to 200,000 kg. in the first 6 months of 1991; Cheminor's market share during the same time period increased from 2.19% to 11.19%. JA 1242-43. Cheminor's production of bulk ibuprofen was subsidized by the government of India, and its sales increase was achieved through sales at prices that were less than fair value. JA 1243. As of 1991, it was the only manufacturer based in India and authorized to sell bulk ibuprofen in the United States, although four other Indian manufacturers had initiated the process of seeking FDA approval to sell bulk ibuprofen and a fifth had been licensed to manufacture bulk ibuprofen. JA 1242, 1250, 1426.

Effective July 1, 1991, the United States Trade Representative removed ibuprofen from India from the Generalized System of Preferences ("GSP") program because of "its potential impact on U.S. producers." JA 1248, 1445.

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[1] References to "JA" are to the Joint Appendix submitted with the briefs to the U.S. Court of Appeals for the Third Circuit.

On July 31, 1991, Ethyl filed an antidumping/countervailing duty petition (the "Petition") with the U.S. Department of Commerce ("DOC") and the U.S. International Trade Commission ("USITC"), pursuant to 19 U.S.C. §§ 1671, *et seq.*, alleging that Cheminor's ibuprofen was being sold in the U.S. at less than fair value margins of 34% to 39%, that Cheminor was benefiting from over thirteen separate subsidies which totaled in excess of 76% of export value, and that Cheminor's continued practice of dumping subsidized ibuprofen into the United States "has caused and is causing material injury to petitioner and threatens it with further injury." JA 1464, 1490, 1499-1515.

The filing of Ethyl's Petition initiated dual proceedings. JA 1465. The DOC investigated whether the government of India was subsidizing Cheminor's production and export of ibuprofen and whether Cheminor was dumping ibuprofen into the U.S. market at less than fair market prices. *Id.* The USITC investigated whether or not the domestic industry (*i.e.*, Ethyl) was being harmed by, or was threatened with material injury as a result of, ibuprofen imported from India by Cheminor. *Id.* The DOC determined preliminarily that ibuprofen imported from India by Cheminor was being sold in the United States at less than fair value and that there was an estimated dumping margin of 115.94%. JA 1472. The DOC also determined preliminarily that the Indian government had been subsidizing Cheminor in the amount of 43.71% of export value. JA 1471.

Cheminor does not challenge these preliminary determinations by DOC. Nor does it suggest that Ethyl made any misrepresentations in connection with them.

Instead, Cheminor contends that "Ethyl misrepresented information regarding its sales, profitability, prices, and cash flow to establish material injury," and that these "misrepresentations concerned three of five factors that the ITC is required by law to consider." Petition for Writ of Certiorari ("Pet.") at 3.

In fact, however, the USITC, in making a preliminary determination whether there is a "reasonable indication that . . . an industry in the United States . . . is materially injured . . . by reason of imports" pursuant to 19 U.S.C. § 1671(b)(a), *see* Pet. App. F at 112a-113a, is required to consider "(I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products[.]" 19 U.S.C. § 1677(7)(B)(i); Pet. App. F at 115a.[2] The statute then enumerates a number of elements within each of these three broad factors that the USITC is directed to consider in evaluating the impact of imports on the affected domestic industry. *See* 19 U.S.C. § 1677(7)(C); Pet. App. F at 116a-119a.

The USITC issued questionnaires to Ethyl, Cheminor (and its domestic sales agent, Flavine International, Inc. ("Flavine")), and a number of third-party tableters. JA 1465, 1469-70, 2116, 2129-30. In response to a direction by the USITC, Ethyl provided specific instances of lost sales and revenues as a result of competition from Indian

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[2] The USITC may also "consider such other economic factors as are relevant to the determination . . . . " 19 U.S.C. § 1677(7)(B)(ii); Pet. App. F at 115a.

ibuprofen, as well as the names, addresses and contact persons for Ethyl's customers who could substantiate those instances. JA 1516-18.

Cheminor's claim that Ethyl misrepresented its profitability boils down to an accountant's debate about whether Ethyl properly allocated certain of its costs to its ibuprofen business. In its Petition and subsequent responses to the USITC questionnaire, however, Ethyl disclosed that its sales of ibuprofen had increased significantly in terms of both quantity and value during the six month period immediately before Ethyl filed the Petition, but that Ethyl's profit margins had declined. JA 1466, 1722-46. Both the Petition and the questionnaire response indicated that the lower profits for the first half of 1991 were caused in part by increased costs. JA 1518, 1728, 1731-32.

In a hearing before the USITC and then in a post-hearing brief, Cheminor and Flavine contended that Ethyl's financial condition was adversely affected by factors other than increased imports, including a change in Ethyl's manufacturing process and a recall of bulk ibuprofen. JA 1466-68, 1831, 1858-59, 2066-67. They urged the USITC to scrutinize Ethyl's allocation of research and development costs, as well as capital expenditures. JA 2048, 2052. Significantly, they did not address Ethyl's further submissions establishing that the domestic industry was also confronted with a threat of injury – an issue that did not require analysis of the current condition of the domestic industry – other than to deny, conclusorily, that the record demonstrated any "discernible trends" that could support a finding of a threat of material injury. JA 2054-64.

The USITC preliminarily determined that there was a reasonable indication that the domestic ibuprofen industry was materially injured by reason of imports of ibuprofen from India, citing Ethyl's "financial trends" as well as "other factors, such as apparent domestic consumption and market share . . . ." JA 1469, 2097-98; Pet. App. D at 98a-99a. As the USITC noted: "the imports of bulk ibuprofen . . . from India rose over the investigatory period, both in terms of quantity and value. The Indian imports also gained market share steadily throughout the period, by both quantity and value." Pet. App. D at 101a.

Cheminor had not disputed that it was selling its ibuprofen at below-market prices. Instead, it argued that the lower prices for Cheminor ibuprofen did not affect Ethyl because the brand name customers who purchased from Ethyl paid higher prices than the generic customers who purchased Cheminor ibuprofen. JA 2099. The USITC rejected this argument as well, based on the responses to the confidential questionnaires submitted by tableters:

> The confidential pricing information shows falling prices, with some evidence of underselling by the Indian imports. There is also some evidence that, even in instances in which the domestic products and imports do not compete directly for sales to the same tableter, alleged unfairly traded Indian imports may still ultimately affect domestic prices by forcing Ethyl's tableter-customers, who compete with tableters using the subject imports, to insist that Ethyl lower or at least not raise its prices so that the prices of the finished tablets can remain competitive.

Pet. App. D at 101a.

Because of its preliminary determination that imports of ibuprofen from India were a cause of actual "material injury," the USITC did not reach the issue of whether those imports and related developments constituted a *threat* of material injury.[3] JA 2098.

USITC Acting Chairman Anne Brunsdale filed a concurring opinion, in which she concluded – without reference to Ethyl's financial condition – that imports from India were a cause of material injury to the domestic industry. Pet. App. D. at 103a-109a. This conclusion was based upon the substitutability of ibuprofen from India for domestically-manufactured ibuprofen, the high level of dumping and subsidy margins, and the share of the domestic market represented by ibuprofen from India. *Id.*

After the USITC and DOC had announced their determinations, Cheminor declared that it was withdrawing from the market,[4] and Ethyl withdrew its petition. JA 1471-72, 1251, 2184. Cheminor returned to the market, and in August 1994 brought suit in state court, asserting

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[3] The Third Circuit observed that, "even if the ITC had not found present material injury based upon Ethyl's claims, the threat of material injury stemming from Indian subsidization and dumping at less than fair value in the future would have more than sufficed to justify Ethyl's petition." *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 127 (3d Cir. 1999); Pet. App. A at 22a-23a.

[4] Cheminor was not "involuntarily forced out" of the market. Pet. at 4. To the contrary, it had the option of posting a cash deposit or bond for its imports, equal to 43.71% *ad valorem*, as a countervailing duty to compensate for the subsidies it received from the government of India. JA 1471. It chose not to do so.

claims of malicious prosecution, abuse of process, tortious interference and unfair competition. JA 2919. Ethyl removed the case to the U.S. District Court for the District of New Jersey. JA 2830. Cheminor then amended its complaint in June 1995 to add unspecified "federal and state antitrust" claims against Ethyl and "John Does 1 through 10," who "allegedly conspired with Ethyl in the misconduct alleged in [the] complaint." JA 393, 401.[5]

As amended, the gravamen of Cheminor's complaint is that Ethyl presented information in its Petition concerning its alleged injury that was "manipulated, incomplete, inaccurate and/or false", *see* JA 395 at ¶ 17, and that "[i]n fact, however, Ethyl's injury, if any, was caused by other factors including, but not limited to, FDA recalls, inability to obtain (or difficulty in obtaining) FDA approval for Ethyl's new production methods and requirements of customers to supplement their existing abbreviated new drug application because of Ethyl's change in production process." JA 394-95 at ¶ 12. These were the very arguments that Cheminor and Flavine had made to the USITC. JA 1467-68.

Ethyl moved for summary judgment, on the grounds that the filing of the Petition was entitled to immunity under the *Noerr-Pennington* doctrine.[6] It presented certifications by competent witnesses that demonstrated that

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[5] The amended complaint is reproduced as an appendix to this brief.

[6] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

it had not misrepresented its financial condition,[7] *see* JA 1240-53, 1464-73, 2770-94, and argued that, assuming *arguendo* that Cheminor could adduce evidence to support its allegations, Ethyl nonetheless had more than "probable cause" to file its Petition. Ethyl consequently urged the district court to grant summary judgment on Cheminor's antitrust and common law claims, pursuant to this Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) ("*PRE*"). In response, Cheminor filed a number of certifications of counsel who lacked personal knowledge of the facts involving the Petition, and presented no evidence discussing Cheminor's prices, subsidies, market share, customers, inventory, or any of the statutory factors considered by the DOC and USITC in their determinations other than Ethyl's financial condition. JA 2290-2769.

The district court granted summary judgment on the antitrust claims, applying *PRE*. *See Cheminor Drugs, Ltd. v. Ethyl Corp.*, 993 F. Supp. 271 (D.N.J. 1998), *aff'd*, 168 F.3d 119 (3d Cir. 1999); Pet. App. C; Pet. App. A. It dismissed the common law claims for lack of subject matter jurisdiction. *See Cheminor Drugs*, 993 F. Supp. 271; Pet. App. C. The United States Court of Appeals for the Third Circuit affirmed summary judgment on the antitrust claims, and affirmed summary judgment on the common law claims by application of "the same First Amendment principles on which *Noerr-Pennington* is based . . . . " *Cheminor*

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[7] The Third Circuit noted that, "of the charges made by Cheminor, each was refuted by Ethyl in its brief to the Court . . . . " *Cheminor Drugs*, 168 F.3d at 126 n.14; Pet. App. A at 17a n.14.

Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128 (3d Cir. 1999); Pet. App. A at 24a.

SUMMARY OF THE ARGUMENT

The Third Circuit correctly applied the *Noerr-Pennington* doctrine to affirm the entry of summary judgment by the district court on Cheminor's federal and state antitrust claims. Contrary to Cheminor's contention in its petition for a writ of certiorari, the Third Circuit's decision is consistent with this Court's precedents as well as with decisions by the United States Courts of Appeals for the Ninth and District of Columbia Circuits. Moreover, application of the same First Amendment principles underlying *Noerr-Pennington* to Cheminor's common law claims was appropriate under the facts of this case.

ARGUMENT

In its petition for a writ of certiorari, Cheminor seizes upon *dictum* in this Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), to the effect that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513. It suggests without saying so directly that this *dictum* supports the "principle" that the "sham" litigation exception to *Noerr-Pennington* immunity can and should be met any time an antitrust plaintiff alleges that the defendant committed a misrepresentation in an adjudicatory context. And it claims that this Court, in articulating the two-part definition of

"sham" litigation in *PRE*, left open the question whether that definition "applies in cases of fraud or misrepresentation . . . . " Pet. at 8. Cheminor is wrong on both counts.

In *California Motor Transport*, this Court extended *Noerr-Pennington* immunity to judicial and administrative agency proceedings, in a case where the defendants had allegedly conspired to initiate repetitive and baseless state and federal proceedings to defeat the plaintiffs' applications to acquire and/or transfer certain operating rights, effectively denying the plaintiffs meaningful access to the appropriate administrative agencies and courts. *See California Motor Transp.*, 404 U.S. at 510-16. This Court concluded that such conduct constituted "sham" litigation:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; *but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused.* That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz., effectively barring respondents from access to the agencies and courts.* Insofar as the administrative or judicial processes are involved, actions of that

> kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Id. at 513 (emphasis added).

Cheminor takes the second sentence in this paragraph from *California Motor Transport* out of context in contending that virtually any allegation of misrepresentation in a judicial or administrative setting may constitute "sham" litigation. *See* Pet. at 5-9. But neither the holding in that case or the paragraph, read in its entirety, supports such a construction. Nor has this Court subsequently adopted the position urged by Cheminor. To the contrary, as this Court held in rejecting the invitation to carve out an additional exception ("conspiracy") to *Noerr-Pennington* in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991):

> A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, . . . not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*[.]' "

Id. at 380 (internal citations omitted) (emphasis in original).

This Court also took pains in *City of Columbia* to limit the holding in *California Motor Transport* to its facts:

> California Motor Transport involved a context in which the conspirators' participation in the governmental process was itself claimed to be a "sham," employed as a means of imposing cost and delay. . . . The holding of the case is limited to that situation. To extend it to a context in which the regulatory process is being invoked

> genuinely, and not in a "sham" fashion, would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid.

Id. at 381-82.

In *City of Columbia*, this Court left open the question "whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant." *PRE*, 508 U.S. at 57. That question was answered in the negative by *PRE*, which held that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Id.*

In footnote six of its decision in *PRE*, the Court qualified its requirement that, to constitute a "sham," a "litigation must fail to be 'genuine' " [*i.e.*, both objectively and subjectively wanting], and noted that "[w]e need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61 n.6.

This case presents neither the necessity nor the opportunity to resolve the issue left open in footnote six. Contrary to Cheminor's contention, this Court did not appear to be indicating that the two-step definition of "sham" litigation would be *inapplicable* in a case that involved fraud or misrepresentation but that otherwise had an "objective basis" or was "genuinely aimed at procuring favorable government action." By holding open the *possibility* that *Noerr* immunity *might* be unavailable in circumstances involving misrepresentation, the Court seemed to suggest that it could contemplate situations where the fraud or misrepresentation would render

the litigation a "sham" – not that there might be another exception to *Noerr-Pennington* immunity.

The Third Circuit, in affirming the district court's grant of summary judgment, correctly declined "to carve out a new exception to the broad immunity that *Noerr-Pennington* provides." *Cheminor Drugs*, 168 F.3d at 123; Pet. App. A at 11a. Instead, it sought to "determine whether Ethyl's petition was objectively baseless under the Supreme Court's test in *PRE*, without regard to those facts that Cheminor alleges Ethyl misrepresented[,]" reasoning that, "[i]f the alleged misrepresented facts do not infect the core of Ethyl's claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Pennington* immunity under the first step of *PRE*." *Id.*

This approach is entirely consistent with *PRE*. The undisputed facts of record in this case demonstrate that Ethyl had ample probable cause to file its Petition, and genuinely sought to secure government relief from imports of bulk ibuprofen from India that were subsidized by the government of India, dumped on the U.S. market at prices substantially less than fair value, and gaining market share at an alarming rate. The alleged misrepresentations cited by Cheminor amount to no more than a disagreement with the USITC over how to interpret the significance of certain factors relating to Ethyl's financial condition. Cheminor cannot, and does not, claim that it was denied the opportunity to present its arguments to the USITC – an agency that clearly had the expertise and ability to investigate and resolve them. Nor can it plausibly contend that the "core of Ethyl's claim and the government's resulting actions" was infected by

the alleged misconduct. *See Cheminor Drugs*, 168 F.3d at 123; Pet. App. A at 11a.

Moreover, notwithstanding Cheminor's claim that there is a split in the circuits, the Third Circuit actually harmonized the *dicta* and decisions in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1031 (1999), and *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995). In *Kottle*, the plaintiff alleged that the defendant had employed improper and unlawful means to block the plaintiff's application for administrative agency approval to build two kidney dialysis centers. 146 F.3d at 1058. The Ninth Circuit expressed in *dicta* the view that the "sham" exception had three "variants": (1) "objectively baseless" litigation intended to interfere directly with the business of the plaintiff; (2) repetitive litigation falling within the rubric of *California Motor Transport*; and (3) litigation where " 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " *Id.* at 1060 (quoting *Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1982)).

Ultimately, the Ninth Circuit in *Kottle* held that the plaintiff's "vague allegations of misrepresentation 'are . . . insufficient to overcome *Noerr-Pennington* protection,' " and affirmed the district court's dismissal of the action for failure to state a claim. *Id.* at 1064 (quoting *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 536 (9th Cir. 1991)). In the process, the court applied "a heightened pleading standard" to claims arising out of " 'conduct which is prima facie protected by the First

Amendment, [because] the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.' " *Id.* at 1063 (quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. Of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976)). In words equally applicable to Cheminor's claims here, the court also noted that such a heightened pleading standard " 'would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as "misrepresentations" by the other party.' " *Id.* (quoting *Oregon Natural Resources Council*, 944 F.2d at 536).

In *Whelan v. Abell*, the plaintiffs had sued the defendants in tort, and obtained jury verdicts in their favor on their claims of tortious interference and breach of fiduciary duty. 48 F.3d at 1249. The trial court had previously granted summary judgment to the defendants on the plaintiffs' claims of malicious prosecution and abuse of process, and granted judgment n.o.v. on the tortious interference claim. *See id.* at 1250. The defendants did not raise *Noerr-Pennington* as a defense until after the jury verdict. *See id.* After reversal on appeal of the j.n.o.v. and summary judgment rulings, the district court granted judgment as a matter of law on the tortious interference claim and summary judgment on the abuse of process and malicious prosecution claims, all predicated on *Noerr-Pennington*. *See id.*

On appeal the second time, the D.C. Circuit assumed "that *Noerr-Pennington* or the First Amendment reaches such torts in some sense," and noted that the jury verdict in favor of the plaintiffs was based on an instruction that permitted such a finding only if the defendants "filed

deliberate falsehoods." *Id.* at 1254. It cited the Ninth Circuit decision in *Liberty Lake*, 12 F.3d 155, as having construed footnote 6 in *PRE* "as making *PRE*'s two-part 'sham' test inapplicable where there was 'proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the [prior] litigation of its legitimacy.' " *Whelan*, 48 F.3d at 1255 (quoting *Liberty Lake*, 12 F.3d at 159). It then reversed the judgment on the tortious interference claim and remanded for entry of judgment in the plaintiffs' favor on the verdict. *See id.* at 1256. It also reversed the summary judgment on the abuse of process and malicious prosecution claims, but remanded them for further proceedings. *See id.* at 1256-57.

As the Third Circuit noted in the instant case, "[o]ur approach in requiring that misrepresentations must be *material* to bar *Noerr-Pennington* immunity is consistent with the two other circuit courts of appeals that have considered this issue." *Cheminor Drugs*, 168 F.3d at 124 n.12; Pet. App. A at 13a n.12. The only difference between the holding by the Third Circuit and the *dicta* in *Kottle* and *Whelan* is that the Third Circuit carefully conducted its analysis of whether Ethyl's Petition was "objectively baseless" or supported by "probable cause" within the framework established by this Court in *PRE* for evaluation of all allegedly "sham" litigation.

Cheminor is likewise in error in contending that "[t]here is no remedy for the fraud that the Third Circuit is uniquely prepared to tolerate." Pet. at 14. In declining to strip litigants of their First Amendment rights "if the alleged misrepresentations do not affect the core of the litigant's (here, Ethyl's) case," the Third Circuit noted "that other remedies such as provided by under Federal

Rules of Civil Procedure 11 and 60(b)(3) exist for alleged misrepresentations that do not taint the core of the litigant's case." *Cheminor Drugs*, 168 F.3d at 123; Pet. App. A at 11a. And Cheminor itself points out the obvious: that "perjury and the submission of false information to governmental agencies are crimes." Pet. at 16 (citing 18 U.S.C. §§ 1001, 1621).

Finally, Cheminor accuses the Third Circuit of an unwarranted and unprecedented "expan[sion]" of *Noerr-Pennington* to Cheminor's common law claims. *Id.* at 5. But the Third Circuit simply applied "the same First Amendment principles on which *Noerr-Pennington* immunity is based," citing earlier decisions from the Third and Ninth Circuits. *Cheminor Drugs*, 168 F.3d at 128-29; Pet. App. A at 24a-25a. And in deciding *PRE*, this Court referred to the concept of probable cause "as understood and applied in the common-law tort of wrongful civil proceedings." 508 U.S. 62. On the facts of this case, then, there is nothing unprecedented or unwarranted about the determination that the First Amendment provides Ethyl with immunity from suit under the common law as well as under state and federal antitrust laws for filing its Petition with the DOC and USITC. Otherwise, a litigant who would be barred by *Noerr-Pennington* from advancing antitrust claims could simply bypass the First Amendment by restating its claims in tort.

CONCLUSION

For the foregoing reasons, Ethyl respectfully requests that Cheminor's petition for a writ of certiorari be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHEMINOR DRUGS, LTD., et al.	Hon. Nicholas H. Politan
Plaintiffs,	Civil Action No. 94-4371
v.	**AMENDED COMPLAINT**
ETHYL CORPORATION and JOHN DOES 1-10,	(Filed Jun. 1, 1995)
Defendant.	

Plaintiffs Reddy Cheminor, Inc. and Cheminor Drugs, Ltd. (collectively "Cheminor"), by and through their undersigned counsel, Budd Larner Gross Rosenbaum Greenberg & Sade, complaining of defendant Ethyl Corporation ("Ethyl"), allege as follows:

A. The Parties

1. Cheminor Drugs is an Indian company which sold bulk ibuprofen to New Jersey. Cheminor Drugs maintained a part-time New Jersey based employee until

the formation of its New Jersey based subsidiary, Reddy-Cheminor.

2. Reddy-Cheminor is a New Jersey corporation with its principal place of business located at 66 South Maple Avenue, Ridgewood, New Jersey.

3. Ethyl is a corporation with its corporate headquarters located at 330 South 4th Street, P.O. Box 2189, Richmond, Virginia 23217. Ethyl also has offices and plants in South Carolina and Louisiana.

4. John Does 1-10 are individuals and corporate entities, including employees of Ethyl, Ethyl's agents and unrelated corporate entities, which conspired with Ethyl in the misconduct alleged in this Complaint.

B. Statement of Facts

5. On July 31, 1991, Ethyl filed a petition with the Secretary of the United States Department of Commerce and the United States International Trade Commission requesting the imposition of anti-dumping and countervailing duties on imports of bulk ibuprofen from India.

6. At that time, Ethyl knew that Cheminor was the only producer of FDA approved Indian ibuprofen being imported into this Country.

7. Ethyl's petition stated, and contained information which purported to show, that Cheminor's imports into the United States of bulk ibuprofen were sold at prices which were less than fair value and were subsidized by the Government of India.

8. Ethyl's petition also stated, and contained information which purported to show, that low priced ibuprofen from India was being sold at less than fair value margins of up to thirty-nine percent.

9. Ethyl's petition also stated, and contained information which purported to show, that Indian ibuprofen was subsidized by the Government of India in amounts in excess of seventy-six percent.

10. Ethyl petition further stated, and contained information which purported to show, that such dumped and subsidized imports had caused, were causing and threatened to cause material injury to Ethyl.

11. Specifically, Ethyl's petition contained various internal documents and/or calculations which purported to demonstrate that, as a result of plaintiffs' sales: Ethyl's capacity utilization had dropped, its ibuprofen operation had experienced a drop in profitability, it had lost customers, it had been forced to reduce its prices to all of its customers in order to retain other customers, and that Ethyl had been forced to forego contractually scheduled price increases to maintain customers.

12. In fact, however, Ethyl's injury, if any, was caused by other factors including, but not limited to, FDA recalls, inability to obtain (or difficulty in obtaining) FDA approval for Ethyl's new production methods and requirements of customers to supplement their existing abbreviated new drug application because of Ethyl's change in production process.

13. Ethyl also was not injured in the relevant market because same included acetaminophen and aspirin.

14. For all of these reasons, and other reasons which are currently unknown, Ethyl was not being materially injured by Cheminor's conduct and its allegations to the contrary were false.

15. Ethyl's petition was certified under oath by Ethyl's Director of International Trade and Regulatory Affairs to be complete and accurate.

16. The financial information provided by Ethyl was stated to be confidential and filed under protective order.

17. Upon information and belief, the information provided by Ethyl was either manipulated, incomplete, inaccurate and/or untrue.

18. As a result of Ethyl's manipulated, incomplete, inaccurate and/or false statements, preliminary determinations were reached by the Department of Commerce and International Trade Commission which imposed such significant anti-dumping and countervailing duties on imports of bulk ibuprofen as to make it impossible for Cheminor to continue to sell bulk ibuprofen in the United States.

19. Based on these decisions, all outstanding orders and letters of credit for Cheminor's bulk ibuprofen product were cancelled.

20. In view of the tremendous loss in business, Cheminor was forced to immediately cease the production of bulk ibuprofen, sell off its inventory, and to convert its facility to the production of other chemical products.

21. A final ITC decision was never reached, however.

22. Ethyl repeatedly requested extensions from the ITC to answer the ITC questionnaire and, upon information and belief, did not want to have its financial information verified by the ITC staff.

23. While delaying verification, on February 28, 1992, Ethyl secretly attempted to reach an agreement with Cheminor pursuant to which Ethyl would purchase at extremely low prices between 300 and 500 metric tons of ibuprofen over the next two years. (*Exhibit A*).

24. Ethyl advised Cheminor that it had until March 3, 1992 to accept the proposal. This proposal was extortion: sell to us or we will ensure that the ITC imposes such high duties as to make it impossible for you to do ibuprofen business in the United States.

25. At a March 3, 1992 meeting, Cheminor refused to be blackmailed and rejected Ethyl's offer.

26. On March 4, 1992, the day after Cheminor's time to accept Ethyl's offer lapsed, Ethyl withdrew its petition.

COUNT I

Malicious Prosecution

27. Cheminor repeats and realleges the allegations set forth above as if fully set forth at length herein.

28. The anti-dumping and countervailing duty actions were brought and/or prosecuted without reasonable or probable cause in that Ethyl knew or should have known that its allegations including those set forth above were false.

29. Ethyl's action was actuated by malice in that Ethyl intended to interfere with Cheminor's business without justification and that said action was instituted and/or continued primarily for a purpose other than that of securing proper adjudication of the claim.

30. Upon information and belief, Ethyl's purpose in commencing and/or continuing the action was to delay Cheminor and to ensure that Ethyl would keep its customer relationships during a period of large recalls and changes in its production processes which changes required its customers to supplement their existing abbreviatied new drug applications in order to continue to purchase Ethyl's ibuprofen.

31. Ethyl did not want its customers, who needed FDA approval to qualify their source of product, to qualify with Cheminor instead of requalifying with Ethyl.

32. The costs of qualification are significant and, upon information and belief, Ethyl knew that customers would not incur the cost of qualifying with Cheminor if the cost of Cheminor's product was going to be

increased, or could be increased, by anti-dumping and countervailing duty proceedings.

33. Upon information and belief, Ethyl's purpose was also to coerce and force Cheminor to become Ethyl's captive and/or low cost supplier of ibuprofin and to eliminate a competitor.

34. As a result of Ethyl's misconduct, Cheminor suffered special damages consisting of an interference with its business and/or property.

35. Said action was terminated favorably to Cheminor in that Ethyl unilaterally withdrew the prosecution.

COUNT II

Abuse of Process

36. Cheminor repeats and realleges the allegations set forth above as if fully set forth at length herein.

37. At the time of and/or after issuance of the petition, Ethyl abused and perverted the ITC and Department of Commerce process with the ultimate motive and improper purpose of extorting Cheminor to become Ethyl's supplier of below market bulk ibuprofen.

38. Cheminor was damaged by Ethyl's abuse of process.

COUNT III

Tortious Interference

39. Cheminor repeats and realleges the allegations set forth above as if fully set forth at length herein.

40. Ethyl was aware of Cheminor's contracts to sell bulk ibuprofen to and in New Jersey.

41. Despite this knowledge, Ethyl wrongfully and without justification or excuse intentionally and maliciously interfered with Cheminor's contracts by filing and prosecuting the petition.

42. In doing so, Ethyl caused damage to Cheminor.

COUNT IV

Tortious Interference with Prospective Economic Advantage

43. Cheminor repeats and realleges the allegations set forth above as if fully set forth at length herein.

44. In addition to Cheminor's contract rights, Ethyl was aware that Cheminor had the reasonable expectation of receiving economic benefit or advantage from other prospective relationships concerning the sale of ibuprofen.

45. Without justification or excuse, Ethyl wrongfully interfered with Cheminor's expectation of economic benefit.

46. In doing so, Ethyl caused damage to Cheminor.

COUNT V

Unfair Competition

47. Cheminor repeats and realleges the allegations set forth above as if fully set forth at length herein.

48. Ethyl's conduct as described above is in violation of common law obligations to compete fairly for business.

49. As a result of Ethyl's unfair competition, Cheminor was injured.

COUNT VI

State And Federal Anti-trust Claims

50. Cheminor repeats and realleges the allegations set forth above as if fully set forth at length herein.

51. The above facts constitute a violation of the Federal anti-trust laws and the anti-trust laws of the State of New Jersey.

WHEREFORE, Cheminor respectfully requests judgment for compensatory and punitive damages, attorneys' fees and costs of suit.

BUDD LARNER GROSS
ROSENBAUM GREENBERG &
SADE, P.C.
Attorneys for Plaintiffs

By: /s/ Andrew J. Miller
Andrew J. Miller

Dated: June 16, 1995

JURY DEMAND

Plaintiffs hereby demand a trial by a jury on all issues so triable.

BUDD LARNER GROSS
ROSENBAUM GREENBERG &
SADE, P.C.
Attorneys for Plaintiffs

By: /s/ Andrew J. Miller
Andrew J. Miller

Dated: June 16, 1995

RULE 4:5-1 CERTIFICATION

I hereby certify that the matter in controversy is not the subject of any pending action in any court or pending arbitration proceeding and that no such action or arbitration proceeding is presently contemplated.

I hereby certify that the foregoing statements made by me are true. I am fully aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

BUDD LARNER GROSS
ROSENBAUM GREENBERG &
SADE, P.C.
Attorneys for Plaintiffs

By: /s/ Andrew J. Miller
Andrew J. Miller

Dated: June 16, 1995